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## MEMORANDUM

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To: Economic Development Authority

From: Kevin D. Sheehan

Date: July 15, 2014

Subject: EDA Ownership of Land occupied by 76ers

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### Issue.

The subject property must be owned by a Garden State Growth Zone Development Entity (GSGZDE), as defined by N.J.S.A. 52:27D-489r in order to be exempt from taxation on the improvements to the property.

A GSGZDE is defined as a “private corporation incorporated pursuant to Title 14A of the New Jersey Statutes, or established pursuant to Title 42 of the Revised Statutes, for which the profits of the entity are limited as follows. The allowable net profits of the entity shall be determined by applying the allowable profit rate to the total project cost, and all capital costs, determined in accordance with generally accepted accounting principles, of any other entity whose revenue is included in the computation of excess profits, for the period commencing on the date on which the construction of the project is completed, and terminating at the close of the fiscal year of the entity preceding the date on which the computation is made, where: “Allowable profit rate” means the greater of 12 percent or the percentage per annum arrived at by adding one and 1/4 percent to the annual interest percentage rate payable on the entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a governmental agency, the mortgage insurance premium or similar charge, if payable on a per annum basis, shall be considered as interest for this purpose. If there is no permanent mortgage financing the allowable profit rate shall be the greater of 12 percent or the percentage per annum arrived at by adding one and 1/4 percent per annum to the interest rate per annum which the municipality determines to be the prevailing rate on mortgage financing on comparable improvements in the county.” N.J.S.A. 52:27D-489r.

The Economic Opportunity Act states that “every Garden State Growth Zone Development Entity that owns real property within a Garden State Growth Zone and that undertakes the clearance, re-planning, development, or redevelopment of such property is hereby granted an exemption on improvements to such eligible property for any new construction, improvements, or substantial rehabilitation of structures on real property for a period of 20 years from receiving a final Certificate of Occupancy, provided however, that a municipality located within the Garden State Growth Zone shall, by ordinance, opt-in to such program within 90 calendar days of the enactment of P.L.2013, c.161 (C.52:27D-489p et al.). The exemption allowed by this

subsection shall be dependent upon: (1) the owner of the real property making improvements to the real property after the enactment of P.L.2013, c.161 (C.52:27D-489p et al.); and (2) the Division of Codes and Standards, in consultation with the eligible municipality, issuing a final Certificate of Occupancy within 10 years of the date of enactment of P.L.2013, c.161 (C.52:27D-489p et al.).

Coopers Ferry Partnership had planned to form a special purpose entity (SPE) formed by Coopers Ferry Partnership as a GSGZDE to purchase the property from the Economic Development Authority (EDA), develop the office and practice facility, and lease the land and improvements to the Sixers. Under this scenario, the property would be owned by a GSGZDE which would develop property in a GSGZ and the improvements would be entitled to an exemption from real property taxation pursuant to N.J.S.A. 52:27D-489s.

The EDA agreed to acquire the property from the Camden Parking Authority (CPA) to allow the EDA to review and approve the project exempt from local planning board review. The EDA had anticipated acquiring the property from the CPA and owning the property for 5 years, after which the Sixers or an entity formed by it could exercise an option to purchase the property from EDA. The problem is that the EDA is not a GSGZDE and therefore, the improvements on the property will not be entitled to the real estate exemption granted by the EOA during the period of its ownership, creating a significant tax liability that was not anticipated.

#### **1. Ownership of the Property by EDA is not Required in Order to Exempt the Project from the Camden Land Use Ordinances.**

Pursuant to N.J.S.A. 34:1B-5.x of the "The New Jersey Economic Development Authority Act," the EDA has the power, "[w]hen authorized by the governing body of a municipality exercising jurisdiction over an urban growth zone, to construct, cause to be constructed or to provide financial assistance to projects in an urban growth zone which shall be exempt from the terms and requirements of the land use ordinances and regulations, including, but not limited to, the master plan and zoning ordinances, of such municipality."

"Urban growth zone" means any area within a municipality receiving State aid pursuant to the provisions of P.L.1978, c.14 (C.52:27D-178 et seq.) or a municipality certified by the Commissioner of Community Affairs to qualify under such law in every respect except population, which area has been so designated pursuant to an ordinance of the governing body of such municipality. N.J.S.A. 34:1B-3. Camden is an municipality receiving aid pursuant to N.J.S.A. 52:27D-178 et seq.

Within the meaning of the EDA Act, "Project" means: (1) (a) acquisition, construction, reconstruction, repair, alteration, improvement and extension of any building, structure, facility, including water transmission facilities or other improvement, whether or not in existence or under construction, (b) purchase and installation of equipment and machinery, (c) acquisition and improvement of real estate and the extension or provision of utilities, access roads and other appurtenant facilities . . . N.J.S.A. 34:1B-3.

The proposed construction of the Sixers' office and practice facility is a "project" within an urban growth zone within the meaning of the Act, therefore, if the City governing body so authorizes, the EDA can approve the site plan for this project without formal Site Plan review by the City Planning Board. Notwithstanding the exemption provided by N.J.S.A. 34:1B-5.x, the site plan will require review by the City Planning Board pursuant to N.J.S.A. 40:55D-31 for a recommendation to the EDA as to consistency with the City Master Plan.

This exemption from the local land use ordinances is specific and is separate and apart from any exemption generally granted to the State or any of its agencies. In Rutgers, the State University v. Piluso, 60 N.J. 142 (1972), the Court stated that governmental units or instrumentalities may be immune from municipal land use regulations. It stated that the issue of whether an instrumentality of the state is immune is based on the legislative intent with regard to the particular agency or function involved, which intent is rarely expressed but is divined from several factors. Id. at 152-153.

Under the EDA Act, the legislature expressly provided for exemption from local land use ordinances in specific cases. Provided that the local governing body so authorizes, the subject project is one of the specific cases where the express exemption from local land use ordinances applies. The EDA is not required to own the subject property for any period of time. Rather, the exemption applies if the EDA constructs, causes to be constructed or provides financial assistance to the project. Here the provision of GrowNJ tax credits is financial assistance necessary to justify the exemption from local land use ordinances.

## **2. If Ownership by EDA is Required for the Exemption a GSGZDE Entity Could be Formed with Coopers Ferry and the EDA Can Own Stock in the Entity.**

In the alternative, if EDA determines that it must own the property for some period of time in order to exempt the project from local site plan review, the property can be owned by a Garden State Growth Zone Development Entity (GSGZDE) in which the EDA has an equity interest. The EDA Act allows the EDA to hold an equity interest in any corporation. Specifically, "Project" within the EDA Act means: . . . "(2)(d) acquisition of an equity interest in, including capital stock of, any corporation; or any combination of the above, which the authority determines will: (i) tend to maintain or provide gainful employment opportunities within and for the people of the State, or (ii) aid, assist and encourage the economic development or redevelopment of any political subdivision of the State, or (iii) maintain or increase the tax base of the State or of any political subdivision of the State, or (iv) maintain or diversify and expand employment promoting enterprises within the State . . ." N.J.S.A. 34:1B-3.

A GSGZDE is defined as a "private corporation incorporated pursuant to Title 14A of the New Jersey Statutes, or established pursuant to Title 42 of the Revised Statutes, for which the profits of the entity are limited as follows. A special purpose entity could be formed with Coopers Ferry Partnership, in which EDA holds a sufficient equity interest to satisfy the immunity from local land use ordinances. The ownership of this land by the GSGZDE would satisfy the requirements of the tax exemption on improvements.

There would be an agreement between EDA and Coopers Ferry that allows Coopers Ferry to acquire the EDA's interest in the GSGZDE after the time EDA determines it must own the property. Thereafter, Coopers Ferry would continue to own the property until the expiration of the tax exemption. The Sixers will lease the land and building from the GSGZDE for an amount sufficient to satisfy the land taxes, the principle and debt service on the construction loan, and some maintenance obligations, with the right to purchase the property at the end of a 20-year lease.